

Dated: January 18, 2000.

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Acting Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AE23

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for Two Larkspurs From Coastal Northern California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status pursuant to the Endangered Species Act (Act) of 1973, as amended for two plants—*Delphinium bakeri* (Baker's larkspur) and *Delphinium luteum* (yellow larkspur). These species grow in a variety of habitats including coastal prairie, coastal scrub, or chaparral in Sonoma and Marin Counties in northern California. Habitat loss and degradation, sheep grazing, road maintenance activities, and overcollection imperil the continued existence of these plants. Random events increase the risk of extinction to the extremely small plant populations. This rule implements the Federal protection and recovery provisions afforded by the Act for these two species.

EFFECTIVE DATE: February 25, 2000.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W2606, Sacramento, California 95825.

FOR FURTHER INFORMATION CONTACT: Kirsten Tarp, Sacramento Fish and Wildlife Office (see **ADDRESSES** section) (telephone 916/414-6464; facsimile 916/414-6486).

SUPPLEMENTARY INFORMATION:

Background

Delphinium bakeri (Baker's larkspur) and *D. luteum* (yellow larkspur) were found historically in coastal prairie, coastal scrub, or chaparral habitats. Urban development, agricultural land conversion, and livestock grazing have destroyed much of the habitat and

extirpated numerous populations of these two plants in coastal Marin and Sonoma Counties in northern California. The historical range of *Delphinium bakeri* and *D. luteum* did not extend beyond coastal Marin and Sonoma Counties.

Ewan (1942) described *Delphinium bakeri* based on type material collected by Milo Baker in 1939 from Coleman Valley, Sonoma County, California. In the most recent treatment, Warnock (1993) retained the taxon as a full species. Historically, *D. bakeri* was known from Coleman Valley in Sonoma County and from a site near Tomales in Marin County. *Delphinium bakeri* occurs on decomposed shale within the coastal scrub plant community from 120 to 150 meters (m) (400 to 500 feet (ft)) in elevation (California Natural Diversity Database (CNDDDB) 1997).

Delphinium bakeri is a perennial herb in the buttercup family (Ranunculaceae) that grows from a thickened, tuber-like, fleshy cluster of roots. The stems are hollow, erect, and grow to 65 centimeters (cm) (26 inches (in)) tall. The shallowly five-parted leaves occur primarily along the upper third of the stem and are green at the time the plant flowers. The flowers are irregularly shaped. The five sepals (outer most whorl or set of floral parts) are conspicuous, bright dark blue or purplish, with the rear sepal elongated into a spur. The inconspicuous petals occur in two pairs. The lower pair is oblong and blue-purple; the upper pair is oblique and white. Seeds are produced in several dry, many-seeded fruits, which split open at maturity on only one side (*i.e.*, several follicles). *Delphinium bakeri* flowers from April through May (Warnock 1993).

Habitat conversion, grazing, and/or roadside maintenance activities have extirpated occurrences of *Delphinium bakeri* in Marin and Sonoma Counties (California Department of Fish and Game (CDFG) 1994). The CDFG (1994) also reported the species is declining. The only known remaining population, with a total of about 35 plants, is found on a steep road bank on private and county land in Marin County that is threatened by road work, overcollection, and sheep grazing. Because of its extreme range restriction and small population size, the plant is also vulnerable to extinction from random natural events, such as fire or insect outbreaks (CNDDDB 1997).

Heller (1903) described *Delphinium luteum* based on type material collected from "grassy slopes about rocks, near Bodega Bay, along the road leading to the village of Bodega" in Sonoma County. Although Jepson (1970)

reduced *D. luteum* to a variety of *D. nudicaule*, it is currently recognized as a full species (Warnock 1993). *Delphinium luteum* occurs on rocky areas within coastal scrub plant community, including areas with active rock slides, from sea level to 100 m (300 ft) in elevation (Guerrant 1976).

Delphinium luteum is a perennial herb in the buttercup family (Ranunculaceae) that grows from fibrous roots to 56 cm (22 in) tall. The leaves are mostly basal, fleshy, and green at the time of flowering. The flowers are cornucopia-shaped. The five conspicuous sepals are bright yellow, with the posterior sepal elongated into a spur. The inconspicuous petals occur in two pairs. The upper petals are narrow and unlobed; the lower petals are oblong to ovate. The fruit is a follicle. *Delphinium luteum* flowers from March to May.

Never widely distributed, historical populations of *Delphinium luteum* have been partially or entirely extirpated by rock quarrying activities, overcollecting, residential development, and sheep grazing, resulting in the species now being even more narrowly distributed (Guerrant 1976; CNDDDB 1998; Betty Guggolz, Milo Baker Chapter, California Native Plant Society (CNPS), pers. comm. 1995). The CDFG (1994) reported the species is declining. The two remaining populations near Bodega, both on private land, total fewer than 50 plants. Development, overcollection, and sheep grazing threaten the remaining two populations. Because of its extreme range restriction and small population size, the plant is also vulnerable to extinction from random natural events, such as fire or insect outbreaks (CNDDDB 1998; B. Guggolz, pers. comm. 1995).

Previous Federal Action

Federal Government actions on the two species began as a result of section 12 of the Act (16 U.S.C. 1531 *et seq.*), which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94-51, was presented to Congress on January 9, 1975, and included *Delphinium bakeri* and *D. luteum* as endangered. We published a notice on July 1, 1975 (40 FR 27823) of our acceptance of the report of the Smithsonian Institution as a petition within the context of section 4(c)(2) (petition provisions are now found in section 4(b)(3) of the Act) and our intention to review the status of the plant taxa named in the report. The above two taxa were included in the

July 1, 1975, notice. On June 16, 1976, we published a proposal (41 FR 24523) to determine approximately 1,700 vascular plant species to be endangered pursuant to section 4 of the Act. The list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and us in response to House Document No. 94-51 and the July 1, 1975, **Federal Register** publication. *D. bakeri* and *D. luteum* were included in this **Federal Register** document.

General comments received in relation to the 1976 proposal were summarized in an April 26, 1978, notice (43 FR 17909). The Act Amendments of 1978 required that all proposals over two years old be withdrawn. A one-year grace period was given to those proposals already more than two years old. In the December 10, 1979, notice (44 FR 70796), we published a notice of withdrawal of the June 6, 1976, proposal, along with four other proposals that had expired.

We published a Notice of Review for plants on December 15, 1980 (45 FR 82480). This notice included *Delphinium bakeri* and *D. luteum* as category 1 candidates for Federal listing. Category 1 taxa were those for which we had on file substantial information on biological vulnerability and threats to support preparation of listing proposals. On November 28, 1983, we published a supplement to the Notice of Review (48 FR 53640). This supplement changed *D. bakeri* and *D. luteum* from category 1 to category 2 candidates. Category 2 taxa were those for which data in our possession indicated listing was possibly appropriate, but for which substantial data on biological vulnerability and threats were not currently known or on file to support proposed rules.

The plant notice was revised on September 27, 1985 (50 FR 39526). *Delphinium bakeri* and *D. luteum* were again included as category 2 candidates. Another revision of the plant notice was published on February 21, 1990 (55 FR 6184). In this revision *D. bakeri* and *D. luteum* were included as category 1 candidates. We made no changes to the status of the two species in the plant notice published on September 30, 1993 (58 FR 51144). On February 28, 1996, we published a Notice of Review in the **Federal Register** (61 FR 7596) that discontinued the use of candidate categories and considered the former category 1 candidates as simply "candidates" for listing purposes. Both species were included as candidates in the February 28, 1996, Notice of Review.

Section 4(b)(3)(B) of the Act requires the Secretary to make certain findings

on pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. This provision applied to *Delphinium bakeri* and *D. luteum*, because the 1975 Smithsonian report had been accepted as a petition. On October 13, 1982, we found that the petitioned listing of these species was warranted but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act; notification of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the petition to be recycled, pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed annually in October of 1983 through 1994, and we published a proposed rule on June 19, 1997 (62 FR 33383).

The processing of this final rule conforms with our Listing Priority Guidance published in the **Federal Register** on October 22, 1999 (64 FR 57114). The guidance clarifies the order in which we will process rulemakings. Highest priority is processing emergency listing rules for any species determined to face a significant and imminent risk to its well-being (Priority 1). Second priority (Priority 2) is processing final determinations on proposed additions to the lists of endangered and threatened wildlife and plants. Third priority is processing new proposals to add species to the lists. The processing of administrative petition findings (petitions filed under section 4 of the Act) is the fourth priority. The processing of critical habitat determinations (prudence and determinability decisions) and proposed or final designations of critical habitat will no longer be subject to prioritization under the Listing Priority Guidance. This final rule is a Priority 2 action and is being completed in accordance with the current Listing Priority Guidance.

We have updated this rule to reflect any changes in distribution, status, and threats since publishing the proposed rule and to incorporate information obtained through the public comment period. This additional information did not alter our decision to list these species.

Summary of Comments and Recommendations

In the June 19, 1997, proposed rule (62 FR 33383) and associated notifications, we requested all interested parties to submit factual reports or information that might contribute to development of a final rule. A 60-day

comment period closed on August 18, 1997. We contacted appropriate Federal and State agencies, county and city governments, scientific organizations, and other interested parties and requested comments. We sent copies of the proposed rule and the request for comments letter to seven local libraries for public display. We published newspaper notices in the *Press Democrat* and *Marin Independent Journal* on June 25, 1997; *Sonoma County Independent* on June 26, 1997; and *Petaluma Argus Courier* on June 27, 1997, which invited general public comment.

During the public comment period, we received written comments from five individuals or agencies. Three commenters expressed support for the listing proposal, and two commenters opposed the proposal. Supporting comments were received from the CNPS and two individuals from Washington State University. The two commenters from Washington State University sent a letter informing us of their research on the genetic variation in *Delphinium luteum*. Opposing comments were received by the Washington Legal Foundation and the Marin Farm Bureau. Opposing comments and other comments questioning the proposed rule were organized into specific issues. These issues and our response to each are summarized below.

Issue 1: One commenter stated that the Service should not list *Delphinium bakeri* and *D. luteum* because it has no authority to list or regulate species under the Act that are not involved in interstate commerce. This commenter further believed that Federal listing for *D. bakeri* and *D. luteum* is unnecessary since it would not confer greater protection than California State law already provides for these indigenous plants.

Our Response: The Federal Government has the authority under the Commerce Clause of the U.S. Constitution to protect these species, for the reasons given in Judge Wald's opinion and Judge Henderson's concurring opinion in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 1185 S.Ct. 2340 (1998). That case involved a challenge to application of the Act's prohibitions to protect the listed Delhi Sands flower-loving fly (*Rhapimodas terminatus abdominalis*). As with *Delphinium bakeri* and *D. luteum*, the Delhi Sands flower-loving fly is endemic to only one State. Judge Wald held that application of the Act's prohibition against taking of endangered species to this fly was a proper exercise of Commerce Clause power to regulate:

(1) use of channels of interstate commerce; and (2) activities substantially affecting interstate commerce, because it prevented loss of biodiversity and destructive interstate competition. Judge Henderson upheld protection of the fly because doing so prevents harm to the ecosystem upon which interstate commerce depends and because doing so regulates commercial development that is part of interstate commerce.

Issue 2: One commenter urged us not to list *Delphinium bakeri* and *D. luteum*, stating that "the listing of the two larkspurs violates the Principles of Federalism," and that "California has ample resources to regulate and protect these two larkspur species," and (therefore) "should be able to make its own decisions regarding these plants found within its own border." The commenter further stated that this listing has significant impacts on the rights of private property owners to make reasonable use of their property.

Our Response: As we stated in the proposed rule (62 FR 33383), existing State and local regulations are inadequate to protect these species. The Act does not prevent the State of California from protecting and regulating the two larkspur species. Federal and State regulations complement each other. As discussed further in Factor D of the "Summary of Factors Affecting the Species" section of this final rule, the California Environmental Quality Act (CEQA) and California Endangered Species Act (CESA) apply to actions on private and State lands. For plants, the Federal Endangered Species Act primarily covers Federal land and Federal actions that may affect proposed and listed species.

The listing of plants under the Federal Endangered Species Act does not necessarily restrict any uses of private land unless Federal funding, authorization, or a permit is involved. For example, such private land uses as proper livestock grazing, clearing a defensible space for fire protection around one's personal residence, landscaping (including irrigation), or fence maintenance are not affected by Federal listing of plants. If an activity is conducted, authorized, or funded by a Federal agency, the Federal action agency must consult with us when the activity may affect listed species.

Issue 3: One commenter was concerned that once an endangered species is listed, the designation of critical habitat under the Act would result in a taking of land. This commenter further stated that the "take" provision as applied to the two

larkspurs will have a dramatic and disruptive impact on local land use and planning.

Our Response: As discussed in the "Critical Habitat" section of this final rule, a critical habitat determination is not being made at this time for these plants. The "take" prohibition, as defined in section 9 of the Act, generally does not apply to plants (except when such take is prohibited by state law or occurs in the course of a violation of state criminal trespass law).

Issue 4: One commenter said that we should consider the adverse economic effect that the listing would have on the local agriculture industry.

Our Response: Under section 4(b)(1)(A) of the Act, a listing determination must be based solely on the best scientific and commercial data available. The legislative history of this provision clearly states the intent of Congress to "ensure" that listing decisions are "based solely on biological criteria and to prevent non-biological considerations from affecting such decisions," H.R. Rep. No. 97-835, 97th Cong., 2nd Sess. 19 (1982). As further stated in the legislative history, "applying economic criteria * * * to any phase of the species listing process is applying economics to the determinations made under section 4 of the Act and is specifically rejected by the inclusion of the word 'solely' in the legislation," H.R. Rep. No. 97-835, 97th Cong. 2nd Sess. 19 (1982). Because we are precluded from considering economic impacts in a final decision to list a species, we cannot examine such impacts.

Issue 5: One commenter stated that the plants are in existence because of agriculture and not the opposite.

Our Response: As discussed under Factor A of the "Summary of Factors Affecting the Species" section of this final rule, historical habitat of *Delphinium bakeri* was eliminated by agricultural conversion. The discussion under Factor C explains that both species are limited in their range, have few individuals, and are extremely vulnerable to trampling.

Peer Review

In accordance with interagency peer review policy published on July 1, 1994 (59 FR 34270), we solicited the expert opinions of three independent specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomy, population status, and supportive biological and ecological information for the taxon under consideration for listing. The purpose of such review is to ensure that listing decisions are based on

scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists. The three requested reviewers concurred with the accuracy of the rule and supported listing these taxa. Information provided was incorporated and is presented in the final rule.

Summary of Factors Affecting the Species

Section 4 of the Act and regulations (50 CFR part 424) that implement the listing provisions of the Act established the procedures for adding species to the Federal lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Delphinium bakeri* Ewan (Baker's larkspur) and *Delphinium luteum* Heller (yellow larkspur) are as follows:

A. *The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range.* Of the two remaining populations of *Delphinium luteum*, one located at an old rock quarry site near Bodega has been partially destroyed and fragmented by historical quarry activities. The number of plants remaining at this site continues to decline. Population numbers were between 100 to 200 plants in 1978 (Ed Guerrant, Berry Botanic Garden, pers. comm. 1995), but recent counts indicate that only 30 to 40 individuals remain (B. Guggolz, pers. comm. 1995). The other extant site has fewer than 10 remaining individuals. A historical site near the town of Graton was converted to residential uses by 1987 (CNDDDB 1997).

Historically, habitat of *Delphinium bakeri* was eliminated by agricultural conversion to grainfields (Ewan 1942). Remaining habitat may be threatened by sheep grazing (CNDDDB 1997). One extirpated population was subjected to sheep grazing, but it is unknown if grazing was the primary cause of its demise. The few remaining individuals (approximately 35) are extremely vulnerable to impacts that otherwise might not be significant. Threats to the lone remaining site of *D. bakeri* are discussed under factors B through E. At the rock quarry site near Bodega Bay, the Bodega Harbor landowners association is proposing to build an equipment storage shed and a public trail that would be close to the remaining plants. Although the proposed storage equipment shed would be located on degraded habitat and would have no direct impact on the extant population of *D. luteum*, the public trail would be located adjacent to

the population. The proximity of the trail to the plants would increase the threat from collection (see factor B). Urban development, and its associated recreational activities, continue to threaten the remaining population of *D. luteum* (B. Guggolz, pers. comm. 1995). Although the project proponents have been notified that construction of the shed and trail may be detrimental to *D. luteum*, we understand that the project remains proposed as is.

B. *Overutilization for Commercial, Recreational, Scientific, or Educational Purposes.* Overutilization is a threat for both species. In 1992, all the follicles (a single-celled cavity that acts like a many-seeded fruit, which upon drying splits open to release seeds) were collected from the plants at the only known site of *Delphinium bakeri* (CDFG 1993). Because these follicles contained the plants' seeds, all sexual reproduction for 1992 was lost. Were this collection to occur regularly or in conjunction with unrelated natural events (e.g., fire), the species may be lost. Due to its distinctive yellow flowers, which is uncommon for larkspurs, *D. luteum* is of considerable horticultural interest. Collecting is thought to have extirpated at least one occurrence of *D. luteum* located southwest of Tomales (CNDDDB 1997). Additionally, some of the historical decline to *D. luteum* can be attributed to collecting. *Delphinium luteum* was offered for purchase in horticultural trade journals during the 1940's and 1950's (Michael Warnock, Sam Houston University, pers. comm. 1994). Plants can still be procured from a local nursery, although their seed source is not from the wild. Garden-grown seed is also available through an international garden society (NARGS 1998). Both populations of *D. luteum* are near residential areas, about 30 m (100 ft) from the nearest house, and are subject to collecting. Unrestricted collecting for scientific or horticultural purposes or excessive visits by individuals interested in seeing rare plants could result from increased publicity as a result of this rulemaking.

C. *Disease or Predation.* Most *Delphinium* species are toxic to cattle but not sheep. Ewan (1942) noted that *Delphinium bakeri* did not appear to be poisonous to livestock. However, its toxicity has not been tested. Sheep grazing may threaten the plant (CNDDDB 1997). One extirpated population was subjected to grazing, but it is unknown if grazing was the primary cause of its demise. The few remaining individuals (approximately 35) are extremely vulnerable to impacts that otherwise might not be significant. Although *D.*

luteum has persisted at two sites with sheep grazing for many decades, because of the very low number of individuals in the population, any loss of flowers and/or seeds could significantly reduce chances for the long-term survival of this species (see Factor E).

D. *The Inadequacy of Existing Regulatory Mechanisms.* The California Fish and Game Commission (CFGC) listed *Delphinium bakeri* and *Delphinium luteum* as rare species in 1979 under the California Native Plant Protection Act (CNPPA) (Div. 2 Ch. 10, Section 1900 *et seq.* of the Fish and Game Code). Although the "take" of State-listed plants is generally prohibited under CNPPA (See Sec. 1908), the extent of protection for State-listed plants has been a matter of some uncertainty. CNPPA limits the State's ability to regulate or prohibit the take of plants during agricultural operations, timber harvesting, or mining assessment work, or removal of plants from certain facilities and right-of-way [see Sec. 1913 (a) and (b)]. Under another provision of CNPPA, landowners in some circumstances can remove plants after providing CDFG at least 10 days advance notice [see Sec. 1913(c)]. The scope of these exceptions to CNPPA take prohibition, and consequently to the protection for plants, are unsettled and suspect. State designation as a rare, threatened, or endangered species under the CNPPA does provide for consideration of impacts by State agencies under CEQA, described below.

The CEQA (chapter 2 section 21050 *et seq.* of the California Public Resources Code) requires a full disclosure of the potential environmental impacts of proposed projects. The public agency with primary authority or jurisdiction over the project is designated as the lead agency and is responsible for conducting a review of the project and consulting with the other agencies concerned with the resources affected by the project. Section 15065 of the CEQA Guidelines requires a mandatory finding of significance if a project has the potential to "reduce the number or restrict the range of a rare, threatened, or endangered plant or animal." Species that can be shown to meet the criteria for State listing and have been designated as rare, threatened, or endangered, such as *D. bakeri* and *D. luteum*, must be considered under CEQA guidelines (CEQA Section 15380). Once significant effects are identified, the lead agency has the option to require mitigation for effects through changes in the project or to decide that overriding considerations make mitigation infeasible. In a case

that the lead agency decides that overriding considerations make mitigation infeasible, projects may be approved that cause significant environmental damage, such as destruction of State-listed species. Protection of listed species through CEQA is therefore dependent upon the discretion of the agency involved. In addition, revisions to CEQA guidelines have been proposed which, if implemented, may weaken protections for State-listed, rare, threatened, and endangered species.

E. *Other Natural or Manmade Factors Affecting Its Continued Existence.* The remaining population of *Delphinium luteum* at the rock quarry may be threatened by users of a trail associated with the extension of an existing golf course into the current county scenic easement that exists on the site (B. Guggolz, pers. comm. 1995). This easement is not a conservation easement with us but may offer some limited, incidental protection to the species in terms of controlling development to protect the viewshed. However, the trail's close proximity to the remaining populations of *D. luteum* may increase the amount of collection of the species by people using the trail.

The remaining population of *Delphinium bakeri* occurs on a steep road bank that is adjacent to a county road in Marin County. Some potential exists for herbicide spraying and road maintenance activities that could be detrimental to this species due to the extremely low number of individuals that remain. The degree of threat that these activities pose to the remaining population of *D. bakeri* is uncertain at this time.

Because few populations and/or individuals remain, both *Delphinium bakeri* and *D. luteum* are likely threatened by genetic drift (random change in particular gene frequency that may lead to preservation or extinction of certain genes and an overall reduction of genetic variability). *D. bakeri* has 1 population consisting of 35 plants. *Delphinium luteum* has 2 populations, totaling fewer than 50 plants. Small populations often are subject to increased genetic drift and inbreeding as consequences of their small populations (Ellstrand and Elam 1993). A loss of genetic variability, and consequent reduction in genetic fitness, provides less opportunity for a species to successfully adapt to environmental change (Ellstrand and Elam 1993).

The combination of few populations, small number of individuals found within each population, narrow range, and restricted habitat make these two plant species susceptible to destruction

of all or a significant part of any population from random natural events, such as fire, drought, disease, or other natural occurrences (Shaffer 1981; Primack 1993). Random events causing population fluctuations or even population extirpations are not usually a concern until the number of individuals or geographic distribution become as limited as they have for both *Delphinium bakeri* and *D. luteum* (Primack 1993). Once a plant population becomes significantly reduced due to habitat destruction and fragmentation, the remnant population has a greater probability of extinction from random events.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining this final rule. Habitat loss and degradation, sheep grazing, inadequate regulatory mechanisms, naturally occurring events, small plant populations, road maintenance activities, and overcollection imperil the continued existence of these plants. *Delphinium bakeri* has 1 population with a total of 35 plants. *Delphinium luteum* has 2 small populations with a total of fewer than 50 plants. Both plant species are in danger of extinction throughout all of their range, and the preferred action is therefore to list *D. bakeri* and *D. luteum* as endangered. Other alternatives to this action were considered but not preferred because not listing or listing as threatened would not be consistent with the Act.

Critical Habitat

Critical habitat is defined in section 3, paragraph (5)(A) of the Act as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

In the proposed rule, we indicated that designation of critical habitat was not prudent for *Delphinium bakeri* and *D. luteum* because of a concern that publication of precise maps and

descriptions of critical habitat in the **Federal Register** could increase the vulnerability of this species to incidents of collection and vandalism. We also indicated that designation of critical habitat was not prudent because we believed it would not provide any additional benefit beyond that provided through listing as endangered.

In the last few years, a series of court decisions have overturned Service determinations regarding a variety of species that designation of critical habitat would not be prudent (e.g., *Natural Resources Defense Council v. U.S. Department of the Interior* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Hawaii 1998)). Based on the standards applied in those judicial opinions, we have reexamined the question of whether critical habitat for *Delphinium bakeri* and *D. luteum* would be prudent.

Due to the small number of populations both *Delphinium bakeri* and *D. luteum* are vulnerable to unrestricted collection, vandalism, or other disturbance. We remain concerned that these threats might be exacerbated by the publication of critical habitat maps and further dissemination of locational information. However, we have examined the evidence available for *Delphinium bakeri* and *D. luteum* and have not found specific evidence of taking, vandalism, collection, or trade of either species or any similarly situated species. Consequently, consistent with applicable regulations (50 CFR 424.12(a)(1)(i)) and recent case law, we do not expect that the identification of critical habitat will increase the degree of threat to this species of taking or other human activity.

In the absence of a finding that critical habitat would increase threats to a species, if there are any benefits to critical habitat designation, then a prudent finding is warranted. In the case of this species, there may be some benefits to designation of critical habitat. The primary regulatory effect of critical habitat is the section 7 requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat. While a critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, there may be instances where section 7 consultation would be triggered only if critical habitat is designated. Examples could include unoccupied habitat or

occupied habitat that may become unoccupied in the future. There may also be some educational or informational benefits to designating critical habitat. Therefore, we find that critical habitat is prudent for both *Delphinium bakeri* and *D. luteum*.

The Final Listing Priority Guidance for FY 2000 (64 FR 57114) states, "The processing of critical habitat determinations (prudence and determinability decisions) and proposed or final designations of critical habitat will no longer be subject to prioritization under the Listing Priority Guidance. Critical habitat determinations, which were previously included in final listing rules published in the **Federal Register**, may now be processed separately, in which case stand-alone critical habitat determinations will be published as notices in the **Federal Register**. We will undertake critical habitat determinations and designations during FY 2000 as allowed by our funding allocation for that year." As explained in detail in the Listing Priority Guidance, our listing budget is currently insufficient to allow us to immediately complete all of the listing actions required by the Act. Deferral of the critical habitat designation for *Delphinium bakeri* and *D. luteum* has allowed us to concentrate our limited resources on higher priority critical habitat (including court ordered designations) and other listing actions, while allowing us to put in place protections needed for the conservation of *Delphinium bakeri* and *D. luteum* without further delay. However, because we have successfully reduced, although not eliminated, the backlog of other listing actions, we anticipate in FY 2000 and beyond giving higher priority to critical habitat designation, including designations deferred pursuant to the Listing Priority Guidance, such as the designation for this species, than we have in recent fiscal years.

We plan to employ a priority system for deciding which outstanding critical habitat designations should be addressed first. We will focus our efforts on those designations that will provide the most conservation benefit, taking into consideration the efficacy of critical habitat designation in addressing the threats to the species, and the magnitude and immediacy of those threats. We will develop a proposal to designate critical habitat for both *Delphinium bakeri* and *D. luteum* as soon as feasible, considering our workload priorities. Unfortunately, for the immediate future, most of Region 1's listing budget must be directed to complying with numerous court orders

and settlement agreements, as well as due and overdue final listing determinations (like the one at issue in this case).

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing results in public awareness and conservation actions by Federal, State, and local agencies, private organizations, and individuals. The Act provides for possible land acquisition and cooperation with the State and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us. None of the populations of either species occur on Federal land. Although one of the populations occurs adjacent to a county road, we believe it is unlikely that any activities would occur that involve the use of Federal Highway funds. We anticipate few if any section 7 consultations for either species.

Listing these two plants would provide for development of a recovery plan (or plans) for them. Such plan(s) would bring together both State and Federal efforts for conservation of the plants. The plan(s) would establish a framework for agencies to coordinate activities and cooperate with each other in conservation efforts. The plan(s) would set recovery priorities and

estimate costs of various tasks necessary to accomplish them. The plan(s) also would describe site-specific management actions necessary to achieve conservation and survival of the two plants. Additionally, pursuant to section 6 of the Act, we would be able to grant funds to the State of California for management actions promoting the protection and recovery of these species.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 for endangered plants, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce to possession from areas under Federal jurisdiction any such plant. In addition, the Act prohibits malicious damage or destruction on areas under Federal jurisdiction, and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, or in the course of a violation of State criminal trespass law. Certain exceptions to the prohibitions apply to our agents and State conservation agencies.

The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered plant species. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. We anticipate that few trade permits would ever be sought or issued for the two species because they are not common in cultivation or in the wild.

As published in the **Federal Register** on July 1, 1994 (59 FR 34272), our policy to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range.

We believe that, based upon the best available information, the following actions will not likely result in a violation of section 9, provided these activities are carried out in accordance with existing regulations and permit requirements:

(1) Activities authorized, funded, or carried out by Federal agencies (*e.g.*, livestock grazing, agricultural

conversions, wetland and riparian habitat modification, flood and erosion control, residential development, recreational trail development, road reconstruction, hazardous material containment and cleanup activities, prescribed burns, pesticide/herbicide application, pipelines or utility lines crossing suitable habitat) when such activity is conducted in accordance with consultation conducted under section 7 of the Act;

(2) Residential landscape maintenance (including irrigation) and the clearing of vegetation around one's personal residence as a firebreak.

We believe that the following actions could result in a violation of section 9; however, possible violations are not limited to these actions alone:

(1) Unauthorized collecting of the species on Federal lands; and

(2) Interstate or foreign commerce and import/export without previously obtaining an appropriate permit. Permits to conduct activities are available for purposes of scientific research and enhancement of propagation or survival of the species.

Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

Requests for copies of the regulations regarding listed species and inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon 97232-4181 (telephone 503/231-2063, facsimile 503/231-6243).

National Environmental Policy Act

We have determined that an environmental assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act

This rule does not contain any collections of information that require Office of Management and Budget (OMB) approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An information collection related to the rule pertaining to permits for endangered and threatened species has OMB approval and is assigned clearance number 1018-0094. This rule does not alter that information collection

requirement. For additional information concerning permits and associated requirements for endangered plants, see 50 CFR 17.62 and 17.63.

References Cited

A complete list of all references in this document is available upon request from the Field Supervisor, Sacramento Fish and Wildlife Office (see ADDRESSES section).

Author: The primary author of this final rule is Kirsten Tarp, U.S. Fish and Wildlife Service, Sacramento Fish and

Wildlife Office (see ADDRESSES section); telephone 916/414-6464.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

For the reasons given in the preamble, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

2. Amend § 17.12(h) by adding the following, in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.
 * * * * *
 (h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
* <i>Delphinium bakeri</i>	* Baker's larkspur	* U.S.A. (CA)	* Ranunculaceae	* E	* 681	* NA	* NA
* <i>Delphinium luteum</i> ...	* Yellow larkspur	* U.S.A. (CA)	* Ranunculaceae	* E	* 681	* NA	* NA
*	*	*	*	*	*	*	*

Dated: December 15, 1999.
Jamie Rappaport Clark,
 Director, U.S. Fish and Wildlife Service.
 [FR Doc. 00-1827 Filed 1-25-00; 8:45 am]
 BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AE27

Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for Newcomb's Snail From the Hawaiian Islands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine the Newcomb's snail (*Erinna newcombi*) to be a threatened species under the authority of the Endangered Species Act of 1973, as amended (Act). This freshwater snail is restricted to the Hawaiian Island of Kauai. The distribution of this snail has greatly decreased from the known historic distribution, and the existing populations are presently limited to restricted habitats within six perennial streams on State land. The six known populations of Newcomb's snail and its habitat are currently threatened by

predation by a non native predatory snail, two species of non native marsh flies, a non native fish, and two species of non native frogs. These populations are also subject to an increased likelihood of extirpation from naturally occurring events, including natural disasters such as hurricanes and landslides. This final rule implements the Federal protection provisions provided by the Act for Newcomb's snail.

EFFECTIVE DATE: This rule takes effect February 25, 2000.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Pacific Islands Ecoregion, U.S. Fish and Wildlife Service, 300 Ala Moana Boulevard, Room 3-122, Box 50088, Honolulu, HI 96850.

FOR FURTHER INFORMATION CONTACT: Robert Smith, Pacific Islands Manager, Pacific Islands Ecoregion (see ADDRESSES section) (808/541-2749; facsimile: 808/541-2756).

SUPPLEMENTARY INFORMATION:

Background

The Hawaiian archipelago comprises eight main islands (Niihau, Kauai, Oahu, Molokai, Lanai, Kahoolawe, Maui, and Hawaii) and their offshore islets, plus the shoals and atolls of the Northwest Hawaiian Islands. The main islands and the northwestern chain were formed sequentially by basaltic lava that emerged from a crustal hot

spot currently located near the southeast coast of the island of Hawaii (Stearns 1985). Hawaii is the youngest island in the chain and is characterized by gently sloping shield volcanoes and currently active lava flows. Volcanoes on the other islands are either dormant or extinct. Ongoing erosion has formed steep-walled valleys with well developed soils and stream systems throughout the chain. Kauai, the oldest and most northwesterly of the main islands, is characterized by high rainfall, deep valleys, numerous perennial streams, and luxuriant vegetation.

Four species of Lymnaeidae snails are native to Hawaii (Morrison 1968 and Hubendick 1952). Three of these species are found on two or more of the eight main islands. The fourth species, Newcomb's snail, is restricted to the island of Kauai. Newcomb's snail is unique among the Hawaiian lymnaeids in that the slender, tapering shape typically associated with the shells of lymnaeids has been completely lost. The result is a smooth, black shell formed by a single, oval whorl, 6 millimeters (mm) (0.25 inches (in.)) long and 3 mm (0.12 in.) wide. A similar shell shape is found in a Japanese lymnaeid (Burch 1968), but Burch's study of chromosome number shows that Newcomb's snail has evolutionary ties to the rest of the Hawaiian lymnaeids, all of which are derived from North American ancestors (Patterson and Burch 1978). This parallel evolution of similar shell